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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 956

DART EXPORT CORPORATION, ET AL.,
Petitioners,

versus

THE UNITED STATES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS.

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May, 1956

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THE UNITED STATES,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS.

Petitioners, Dart Export Corporation, Anthony B. Bowers, and Globe Indemnity Company, appellants in the court below, pray that a writ of certiorari issue to review the judgment of the United States Court of Customs and Patent Appeals, entered February 21, 1956, in Customs Appeal Number 4836.

OPINIONS BELOW.

The opinion of the United States Court of Customs and Patent Appeals is reported as "Dart Export Corporation, et al., v. United States", being Customs Appeal No. 4836, Customs Appeal Decision 610, and published in "Treasury Decisions", U. S. Government Printing Office, Vol. 91, No. 14, dated April 5, 1956. The opinion will be reported in 43 C.C.P.A. (Customs) later in 1956, and is printed in the appendix following this petition.

The opinion of the United States Court of Customs, Second Division, dated October 21, 1954, Abstract 58434, is reported at 33 United States Customs Court Reports 386, and is also printed as part of the transcript of record herein.

JURISDICTION.

The judgment of The United States Court of Customs and Patent Appeals, adverse to petitioners, was entered February 21, 1956. No petition for rehearing was filed. This Court has jurisdiction by reason of the provisions of 28 U.S.C. 1256 and 2101 (c).

QUESTIONS PRESENTED.

1. When imported merchandise is entered for consumption in the United States at a rate and amount of duty fixed by the Collector of Customs (in this case 20% *ad valorem*), and the duty assessed thereon by the Collector is paid at the time of entry, and the goods are inspected by the Collector and released to the importer, and there is no evidence of fraud or any change in the factual

basis of the assessment, is the Collector of Customs barred from assessing a higher rate of duty (in this case 45% *ad valorem*) more than 60 days later (in this case 23 months later) under Section 514 of the Tariff Act of 1930 which provides that "all decisions of the Collector" as to the rate and amount of duties shall, after the expiration of 60 days, be final and conclusive on all parties, including the United States and any officer thereof? Or may the Collector, as is contended by the United States, assess a different and higher rate and amount of duty at any time thereafter, even many years later, notwithstanding the express language of Section 514 of the Tariff Act, and notwithstanding that the originally assessed duty was based upon an opinion of the Commissioner of Customs in Washington in the form of a letter addressed to the importer, and upon which the importer relied?

2. If, as contended by the United States, the Collector may liquidate an entry of imported merchandise "at any time" after the entry without restriction, and assess a higher rate and amount of duty, does the Tariff Act of 1930 insofar as it purports to authorize such procedure violate the Constitution of the United States (a) by delegating to the Collector of Customs a power the exercise of which is inherently arbitrary, capricious, and whimsical; (b) by failing to fix any intelligible standard for the assessment and final liquidation of customs duties applicable to merchandise in general and more particularly to articles not specifically enumerated in the Tariff Act; (c) by depriving the importer of property without due process of law; and (d) by making the business of importing such a highly uncertain and financially hazardous venture that foreign trade is thereby restricted?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

As provided by Rule 23 (1) (d) the constitutional and statutory provisions which the case involves, being lengthy, are set forth *verbatim* in the appendix hereto. These are as follows:

The Constitution of the United States, Article I, Section 1; Article I, Section 8; and Amendment V.

The Tariff Act of 1930, Section 505, 19 U.S.C. 1505, 46 Stat. 732.

The Tariff Act of 1930, Section 514, 19 U.S.C. 1514, 46 Stat. 734.

STATEMENT OF THE CASE.

Late in the year 1950 petitioner, an importer in New Orleans, Louisiana, received samples from Germany of a material known as nylon monofilament. It appeared that this material might be profitably imported into the United States provided the rate of duty applicable to it was not too high. Nylon monofilament was not then and is not now specifically provided for in the Tariff Act of 1930, and steps were taken immediately by the importer to obtain a binding ruling from Customs authorities as to the rate and amount of duty applicable so that importation of this merchandise might be commenced. After receiving conflicting opinions from the local Customs House in New Orleans and the Customs Information Exchange in New York, the importer appealed to the Commissioner of Customs in Washington, D. C., for a ruling that could be relied upon. Samples of the material were sent to the Com-

missioner on January 4, 1951, and on February 8, 1951, a letter appearing as "Exhibit #1" in the Transcript of Record was sent by the Bureau of Customs to the importer which concluded with the following sentence:

> "Therefore the Bureau is of the opinion that this merchandise is dutiable at the rate of 20 percent ad valorem under paragraph 1558, Tariff Act of 1930, as nonenumerated manufactured articles".

Subsequent to receiving this letter, and relying upon it, petitioner proceeded to import numerous shipments of the said material through the Ports of New Orleans and New York, including the shipment which is involved in this case and which was entered at the Port of New Orleans on July 27, 1951. Duty was assessed and paid on all shipments at the rate of 20% *ad valorem*, later reduced to 10% by virtue of the Torquay Tariff Agreements, under paragraph 1558, Section 1, Tariff Act of 1930, in accordance with the letter received from the Bureau of Customs referred to above. See Transcript of Record, p. 15.

Almost two years elapsed thereafter during which time, according to the record, no notice of any kind, was given to the importer to suggest or imply that the rate of duty so paid was not final and conclusive. Nevertheless, on June 23, 1953, about 23 months later, the Collector of Customs at New Orleans "liquidated" the entry in question at 45% *ad valorem* under Paragraph 1301 of Section 1, Tariff Act of 1930, as rayon, and demand was made upon the importer for the difference between the 20% originally assessed and the 45% claimed to be due.

It should be stated at this point that there is no dispute as to the facts in this case. The material upon which the Bureau of Customs ruled was the same material which was imported, *i. e.*, filaments of the synthetic material known as nylon. The purported "liquidation" of the entry two years later under paragraph 1301 as **rayon** did not mean that the Collector considered the material to be rayon in fact. Dutiability under the rayon paragraph apparently was predicated upon the theory that, while nylon had no exact counterpart in the Tariff Act, it was dutiable as rayon by virtue of "similitude" as provided in Paragraph 1559, Section 1, Tariff Act of 1930, rather than as a non-enumerated article under Paragraph 1558 as stated in the letter from the Bureau of Customs dated February 8, 1951, and as originally assessed.

The record shows that the shipment involved in this case, after being entered at the Port of New Orleans on July 27, 1951, was released six days later, on August 2, 1951, to the importer by the Appraiser after the latter had examined it for the purpose of checking the quantity, identity, and valuation of the merchandise. See Transcript, p. 18. Nevertheless, it was one year and four months later, on December 2, 1952, before the Appraiser rendered his report to the Collector of Customs, and an additional six months elapsed thereafter before the Collector "liquidated" the entry on June 23, 1953, and, for the first time, made demand on the importer for additional duties. Approximately 23 months had passed between the time of entry and the time of "liquidation", yet only a small fraction of this delay was explained or accounted for in any way. The record clearly shows that no part of the delay was attributable to the importer, and that most of it

was due to inefficiency or negligence on the part of customs agents, or else was wholly unexplained.

Within 60 days from the date of liquidation and demand for additional duties by the Collector, a protest was filed by the importer and other interested parties under the provisions of Section 514 of the Tariff Act of 1930 (19 U.S.C. 1514) on the ground that the liquidation was made too late, that the original assessment at 20% was a decision of the Collector, that under the provisions of Section 514, *supra*, all decisions of the Collector as to the rate and amount of duties chargeable shall, upon the expiration of 60 days after the date of such decision, be final and conclusive upon all persons, including the United States and any officer thereof, and that, in any event, the procedure followed violated Constitutional rights of the importer. In due course trial was had before the United States Customs Court which court held that the Collector of Customs may liquidate an entry at a higher rate of duty than originally assessed **at any time,** even many years after the date of entry, and recover additional duties thereon. The court further held that the 60-day limitation period referred to above does not commence to run until the date of such final liquidation, and that the procedure followed does not violate the Constitution.

An appeal was taken to the United States Court of Customs and Patent Appeals in which court the argument of appellants followed that made in the lower court. The Court of Customs and Patent Appeals affirmed the judgment of the lower court, holding that the Collector may liquidate an entry at any time under the Tariff Act of 1930, and that this procedure is not violative of the Constitution.

The judgment of the United States Court of Customs and Patent Appeals was entered on February 21, 1956, and this petition for a writ of certiorari seeks review of that judgment.

ARGUMENT.

It is submitted that the writ prayed for should be granted for the following reasons:

1. This case, which relates primarily to the finality of Customs duties under the Tariff Act of 1930, presents questions of Federal law of the highest magnitude which have not been, but should be, settled by this Court.

This is a test case the outcome of which vitally affects not only the particular importer involved, but all importers of all types of merchandise. The question of whether the Collector of Customs may re-assess a higher rate and amount of duty than that originally assessed on imported merchandise at any time after the original entry and assessment, even many years later, notwithstanding there is no fraud involved, notwithstanding that the importer has sold the merchandise on the basis of the rate originally assessed, and notwithstanding, as in the present case, that the importer has received an opinion in writing from the Bureau of Customs as to the rate of duty in advance of shipment upon which he relies, has never been decided by this Court under the Tariff Act of 1930, or under any previous tariff act. The question should be decided by this court, not only because it vitally affects the property rights of thousands of importers in this country, but also because it vitally affects a large segment of the economy of the United States and the world at large.

The rule applied by the Courts below is contrary to the plainly expressed intent of Section 514 of Tariff Act of 1930 which imposes a sixty day limitation period on "all decisions of the Collector". To say that the 60-day period does not commence running until after final "liquidation" by the Collector, which may be many years or decades later, is to render meaningless that provision insofar as the importer is concerned. Furthermore, the rule applied by the courts below is so patently unjust as to make even the most callous tax collector wince. Importers buy foreign merchandise generally for resale, and their selling price is based upon the cost of the merchandise plus the amount of duty assessed thereon. If the Collector may assess a much higher rate of duty many years later, the importer is placed in the position of never knowing with any degree of certainty whether he has made a profit or suffered a loss on any given transaction. Such a result alone is sufficient to warrant review by this Court.

But the operation of the rule complained of insofar as it affects individual rights is only one facet of the matter. It is common knowledge that our foreign trade totals many billions of dollars annually. Petitioners contend that the rule applied by the courts below will tend to curtail that trade by making the business of importing such a highly uncertain and financially hazardous venture that importers and potential importers will refrain from purchasing goods abroad and thus prevent foreign countries from earning the dollar exchange they need in order to buy goods from the United States. It is unquestionably within the power of Congress to lay and collect duties and thereby to restrict imports. Petitioners contend, however, that it was neither the intent of Congress nor within the

power of Congress to restrict trade by making the business of importing a gigantic game of chance. The rule applied by the courts below would make our foreign trade just such a game. This is a matter of such great national and international importance as to warrant review by this court.

2. While the precise questions presented by this case have never been decided by this court, the decisions of the courts below are in conflict with the following cases of this Court which involve analogous or related questions:

United States v. Sherman & Sons, 237 U. S. 146, 59 L. Ed. 883, 35 S. Ct. 520;

Davies v. Miller, 130 U. S. 284, 32 L. Ed. 932, 9 S. Ct. 560;

F. Vitelli & Son v. United States, 250 U. S. 355, 63 L. Ed. 1028, 39 S. Ct. 544;

American Net & Twine Co. v. Worthington, 141 U. S. 468, 35 L. Ed. 821, 12 S. Ct. 55;

Hartranft v. Wiegmann, 121 U. S. 609, 30 L. Ed. 1012, 7 S. Ct. 1240;

Nichols v. Coolidge, 274 U. S. 531, 71 L. Ed. 1184, 47 S. Ct. 710, 52 ALR 1081;

Blodgett v. Holden, 275 U. S. 142, 276 U. S. 594, 48 S. Ct. 105, 72 L. Ed. 206;

Untermyer v. Anderson, 276 U. S. 440, 48 S. Ct. 353, 72 L. Ed. 645;

Coolidge v. Long, 282 U. S. 582, 51 S. Ct. 306, 75 L. Ed. 562;

Helvering v. Helmholtz, 296 U. S. 93, 56 S. Ct. 68, 80 L. Ed. 76;

White v. Poor, 296 U. S. 98, 56 S. Ct. 66, 80 L. Ed. 80.

In the case of *United States v. Sherman & Sons Company*, 237 U. S. 146, an importer had imported certain laces from Syria and Egypt and entered the goods for consumption at the Port of New York in the year 1909. Duty was assessed on the goods and paid by the importer. On Page 147 of 237 U. S., the court described the entry and payment as follows:

> "The merchandise was entered at the Port of New York and the duty thereon was assessed by the Collector. The amount of duty **thus liquidated** was paid by the importer and the goods were removed in 1909." (Emphasis added).

The Collector attempted to reliquidate the entry in 1913, four years later, on account of fraud, and the court again referred to the original assessment as a "liquidation" on p. 154 of the opinion as follows:

> "As the importers here filed no protest and made no payment of the duty reliquidated in 1913, it is said that the Collector's finding is as conclusive as was his **original liquidation** in 1909." (Emphasis added).

The above quoted language further supports appellant's contention that the original assessment is a "liquidation" from date of which the limitation statute begins to run. The Court went on to find that the importer's failure to protest within 15 days after the reliquidation in 1913 did not make the finding conclusive, using the following language at page 156 of the opinion:

> "The statement of the proposition is well calculated to raise a doubt as to its correctness. Sa-

bariego v. Maverick, 124 U. S. 261, 291-293. For if the Collector, after one year, can determine that there had been fraud, and thereupon can make a reliquidation having such characteristics of finality as is here claimed for his finding, he can, as in the present case, do so at the end of 4 years; or as in the Vitelli Case, after 7 years; or, as in other pending cases referred to in the argument, after 15 years. If—after such a lapse of time, in which parties may die, witnesses may remove or documents be lost—the Collector can make a finding of fraud which can be resisted only upon condition of paying the amount of the reliquidated duties, then there will be many instances in which his heirs, will be unable to make the cash payment so as to secure the right to prove that there was no fraud either in fact or in law.

"Whether such right to defend, granted on such onerous and sometimes impossible conditions, would afford due process of law to the citizen, otherwise liable to be bound in personam by such reliquidation, need not be discussed. For certainly such a power will not be implied and none such can be found in the Tariff Act of 1909 or in section 21 of the act of 1874. They provide that in the absence of protest a finding of value is conclusive and that the settlement, in accordance with that finding, is, . . . in the absence of fraud, final and conclusive."

It should be noted that under the applicable statutes at that time there was no time limit imposed upon reliquidation for **fraud.** Under the present tariff act a two year limit is imposed on reliquidations for fraud. Tariff

Act of 1930, Section 521, 19 U.S.C. 1521. In any event, there was no fraud in the present case. Had there been no fraud in the *Sherman* case the court unquestionably would have found the original assessment final and conclusive instead of finding, as it did, that the burden of proof was on the Collector to prove fraud.

The case of *Davies v. Miller*, 130 U. S. 284, squarely decided the issue as to whether an importer might file a protest **prior** to final ascertainment and liquidation. The court said that the importer might file a protest at any time after payment of the estimated duties. It should be pointed out that the statute in question provided for protest within 10 days "after the ascertainment and liquidation of the duties". The case is noteworthy **as it found the fixing of estimated duties to be a protestable "liquidation" of the Collector.** It follows that if the original assessment is a protestable liquidation, then the limitation period should commence to run from that date.

F. Vitelli & Son v. United States, 250 U. S. 35, is another case that involved fraud under the Tariff Act of 1874 which provided that "duties shall, after the expiration of one year from the time of entry, in the absence of fraud and in the absence of protest by the owner, importer, agent, or consignee, be final and conclusive upon all parties". The court said (250 U. S., at page 358):

> "Indisputable also is it, as stated by the Court of Customs Appeals and long previously pointed out in United States v. Phelps, 17 Blatch. 312, that the remedy intended to be accomplished by the section in question was to prevent the right to reliquidate, which had previously been exerted

> without limit, from being exercised except in the particular condition stated, **and thus in the interest of the citizen to circumscribe the power to the instances specified in order that uncertainty as to the finality of customs entries might be removed and the security of commercial transactions safeguarded."** (Emphasis added).

This is the Chief Justice of the United States Supreme Court speaking for the undivided court. It would seem that such a plain and obvious statement can hardly be contradicted.

Furthermore, the courts below have violated the rule of construction of the tariff laws set forth in *American Net & Twine Co. v. Worthington*, 141 U. S. 468, and *Hartranft v. Wiegmann*, 121 U. S. 609, to the effect that all doubts should be resolved in favor of the importer. In the *American Net & Twine Co.* case, at p. 474, the court said:

> "but were the question one of doubt, we should still feel obliged to resolve that doubt in favor of the importer, since the intention of Congress to impose a higher duty should be expressed in clear and unambiguous language".

As stated in the *Vitelli* case above, the purpose of the limitation period is perfectly clear. However, if there is any doubt about the matter it should be resolved in favor of the importer.

The cases of *Nichols v. Coolidge*, *Blodgett v. Holden*, *Untermyer v. Anderson*, *Coolidge v. Long*, *Helvering v.*

Helmholtz, and *White v. Poor*, cited above, involve analogous situations in connection with gift and death taxes. The substance of these decisions is that the placing of unforeseeable gift taxes on completed gifts is so unfair and arbitrary as to amount to a denial of due process since such donors are given no chance to elect whether or not to give in view of the tax. As stated by the Court in *Untermyer v. Anderson:*

> "The taxpayer may justly demand to know when and how he becomes liable for taxes—he cannot foresee and ought not to be required to guess the outcome of pending measures."

While these cases deal with arbitrarily retroactive statutes, the principles enunciated therein are *a fortiori* applicable to administrative action, for surely if Congress itself cannot levy an arbitrarily retroactive tax, it cannot delegate that power to an administrative official.

CONCLUSION.

The questions presented by this case are by no means limited to the particular facts which gave rise to it. With ever increasing frequency new and different articles of commerce are being sold or offered for sale to importers in this country by foreign sellers. In many cases it is difficult, if not impossible, to classify such merchandise for customs purposes under the Tariff Act of 1930. Frequently categories overlap, and sometimes an article may be logically classified under any one of several different categories, each bearing a different rate of duty. Similar problems arose under previous tariff acts.

The importer in such cases can only be protected if there is a relatively short limitation period prescribed

by the statute after which all assessments of duty become final and conclusive. All of our recent tariff acts have contained such provisions, including the Tariff Act of 1930 which fixes a 60 day limitation period by Section 514 thereof. Nevertheless, the Court of Customs and Patent Appeals in the present case has held that the Collector of Customs may reclassify merchandise and assess a higher rate of duty thereon at any time, even many years later, notwithstanding the obvious intent and purpose of Section 514, and notwithstanding the decisions of this Court cited above which indicate, if they do not squarely hold, that such a construction is contrary to the intent of Congress and in violation of the due process clause of the Fifth Amendment.

A careful reading of the opinion of the Court of Customs and Patent Appeals in this case reveals that the precise questions presented herein have never been squarely decided by any court, including the Court of Customs and Patent Appeals, previous to this decision. They are important questions affecting billions of dollars worth of foreign trade and the rights of countless importers. They should be decided by this Court.

For the foregoing reasons, petitioners pray that this petition for a writ of certiorari be granted.

Respectfully submitted,

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May 16, 1956.

APPENDIX

UNITED STATES COURT OF CUSTOMS
AND PATENT APPEALS

February 21, 1956

DART EXPORT CORPORATION, ET AL.,
Appellants,

versus

THE UNITED STATES,
Appellee.

October Term, 1955, Customs Appeal No. 4836, Customs Calendar No. 6, Appeal from U. S. Customs Court, Abstract 58434. Affirmed. Henry P. Dart, III, for appellants. Warren E. Burger, Assistant Attorney General, Richard E. FitzGibbon, special attorney, of Counsel, for The United States. Oral argument October 5, 1955, by Mr. Dart and Mr. FitzGibbon.

Before O'Connell, Acting Chief Judge, and Johnson, Worley, and Cole, Associate Judges.

Johnson, Judge, delivered the opinion of the Court:

This is an appeal from the judgment of the United States Customs Court, Second Division, entered pursu-

ant to its decision, Abstract 58434, overruling the protests filed by appellant, Dart Export Corp., which were to the effect that the acceptance by the Collector of Customs of the estimated duties at the time of entry on an importation of "perlon artificial gut" constituted a decision of the Collector which was conclusive on the Government after the passage of sixty days, under section 514 of the Tariff Act of 1930, and that a liquidation made after this time period had elapsed was illegal.

The Customs Court held that the action of the Collector of Customs in liquidating the entry more than 60 days after the estimated duties were paid, did not constitute an illegal act. The question before this court in its broadest aspect, is whether the Customs Court was correct in so holding.

It appears from the record that the importer, prior to the date of entry, was desirous of finding out the exact classification of the merchandise which was to be imported. Samples which were received from a German exporter, were sent by the importer to the Bureau of Customs in Washington, and a request was made for the classification of the merchandise. The Bureau, in a letter dated February 8, 1951, replied that it was of "the opinion that this merchandise is dutiable at the rate of 20 per cent ad valorem under paragraph 1558, Tariff Act of 1930, as non-enumerated manufactured articles." The merchandise, also known as "nylon monofilament," was thereafter entered for consumption on July 27, 1951. On the entry papers it was indicated by the importer that the merchandise was dutiable at 20 per centum ad valorem, in accordance with the information received by the importer from

the Bureau of Customs, and the duty was paid at this rate at the time of entry.

The record discloses that the importation in question was promptly taken to the appraiser. On August 2, 1951, the merchandise was released to the importer, and a "Customs Form 6431" was sent to the Customs Information Exchange in New York. In this respect, the following testimony of Michel T. Blouin, Examiner of Merchandise at the Port of New Orleans, as examined by appellant's counsel, seems particularly applicable in that it describes the sequence of events which occurred, and the reasons why various steps were taken:

* * * *

By Mr. Dart:

Q. After August 2, 1951, Mr. Blouin, what action did your office take? A. We submitted Customs Form 6431 to the Customs Information Exchange as to whether the merchandise was correctly invoiced as to the value, or whether any other shipment had been received at any other port of such merchandise.

Q. What was the date of that report? A. 6431 was the same date of examination, August 2, 1951.

Q. When did you receive a reply from the C.I.E. in answer to that form? A. The reply we received April 29, 1952.

Q. What was the nature of the reply? A. There was a delay notice in between that time. The New York Appraiser asked whether or not I knew the manufacturer of the merchandise, and I was in

touch with your office, I guess with yourself, and you stated you did not know the manufacturer, and on February 18th, I sent - - -

Mr. Kozinn: [Government Attorney] What year?

The Witness: February 18, 1952, I sent a follow up notice to New York, not having heard a reply from my 6431. A reply was received on April 29, 1952.

By Mr. Dart:

Q. On April 29, 1952, what did the C.I.E. advise? A. "No record of shipment of these items in New York. Shipment through San Francisco; date of exportation 9/16/51. Regarding classification, in view of C. D. 1366, this office on the date of 1/17/52 requested Bureau ruling. Classification is suspended pending such ruling."

Q. When was the Bureau ruling received by you? A. The Bureau ruling was received on May 19, 1952, C. I. E. 172/52.

Q. What was the substance of that ruling? A. Do you want me to read it?

Q. In general what did it say? A. It goes along to say how they classified the different types of nylon filament under paragraph 1301 and 1312.

Q. What rate of duty? What rate of duty did the Bureau rule that this material was dutiable at? A. It doesn't give the rate of duty in the C. I. E. circular. It gives the paragraph, and the rate of duty based upon deniers. That is under para-

graph 1301. Then there was an ad valorem duty under 1312.

Q. After receiving that Bureau report, what action did your office take? A. During the month of March, 1952, we issued a delay notice. This was to ascertain from the importer whether or not he had an exclusive sales right.

Q. That was prior to May. You said the Bureau ruling was received on May 19, 1952. All I want to know is what happened after that date insofar as your office was concerned? When did you make your report to the Collector? A. Before I could return the monofilament at 1301, I discovered that we hadn't extracted a sample from each type, and I requested you to furnish me a sample from the original shipment, whatever sample you did have at the time. Then that was submitted to the Customs Laboratory for ascertaining the denier. The laboratory report was returned to me—it was dated November 26, 1952. There is no date shown as to the date it was received at the Appraiser's. Usually it is received one or two days after the chemist makes the report.

Mr. Kozinn: What was the date of the chemist's report?

The Witness: November 26, 1952.

By Mr. Dart:

Q. When did you request me to furnish you with a sample? A. Your letter was dated November 21, 1952.

Q. That was the date of my reply to your request. When did you request it? A. I am not sure whether it was a verbal request or a written request. There is no record showing a written request.

Mr. Kozinn: Mr. Dart, do you concede that a request was made?

Mr. Dart: Yes. I am simply trying to show it wasn't due to any unnecessary delay on my part.

By Mr. Dart:

Q. Do you remember approximately how long before I furnished the sample? Did I delay unreasonably? A. No, I don't think there was any delay.

Q. Then you reported to the Collector when? A. The merchandise was appraised and forwarded to the Collector on December 2, 1952.

Mr. Dart: No further questions.

CROSS EXAMINATION

By Mr. Kozinn:

XQ. When you take a sample from a case and send your 6431 out to the C. I. E., for what purpose is this done? A. Well, for classification purpose is one reason, and the other for value.

XQ. In other words, you are requesting New York to give you information as to 1, classification, and 2, value; is that correct? A. That is correct.

Mr. Kozinn: No further questions.

RE-DIRECT EXAMINATION

By Mr. Dart:

RQ. Mr. Blouin, you have stated that you are not the classifying officer. Who is the final classification officer? A. The Collector.

Q. The Collector himself? A. Yes.

* * * *

The following excerpt from the Government's brief, summarizing the testimony of Claude E. Blancq, Jr., is believed to accurately portray the events which occurred after the Appraiser's report of December 2, 1952, was received by the Collector?

* * * *

> The importer also called as its witness Claude E. Blancq, Jr., the Deputy Collector in charge of the Liquidating Division at New Orleans. Mr. Blancq testified that because the appraisement did not become final until 60 days after the report was filed with the Collector, the entry was not placed in line for tentative liquidation until January 31, 1953 (R. 24). He then testified that a liquidation was not final until it had been verified by the Comptroller of Customs (R. 25). He then stated that the entry was liquidated and liquidation posted on the bulletin in the window of the Liquidating Division on June 23, 1953.

* * * *

At the time of liquidation, the merchandise was classified at the rate of 45 per centum ad valorem under paragraph

1301 of the Tariff Act of 1930 as filaments of synthetic textile, single over 150 deniers, and a claim for additional duties was made on the importer.

On July 25, 1953, the importer filed a protest against the liquidation of June 23, 1953. This protest did not in any way attack the classification of the merchandise made at the time of liquidation, but was presented for the purpose of protesting the claim for additional duties on **"the sole, single issue of date of liquidation, and not on any other ground."** This broadly provided the issue on which the Customs Court rendered its decision.

The main question before this court is whether the acceptance of the estimated duties by the Collector of Customs on the filing of a consumption entry is a **decision** of the Collector within section 514 of the Tariff Act of 1930, **infra,** as to the rate and amount of duty chargeable which becomes final and conclusive at the expiration of sixty days unless either a protest is filed or unless the government takes action within this period.

Various sections of the Tariff Act of 1930, § 484(a)(d), 500, 505, 514, 46 Stat. 722, 729, 732, 734, 19 U.S.C. § 1484(a)(d), 1500, 1505, 1514 (1952), must be considered in analyzing the foregoing question. These sections, insofar as pertinent, read as follows:

> Sec. 484(a)—* * * the consignee of imported merchandise shall make entry therefor * * * under such regulations as the Secretary of the Treasury may prescribe. Such entry shall be made at the customhouse within 48 hours * * * after the entry of the importing vessel * * *.

Sec. 484(d)—Such entry * * * shall set forth such facts in regard to the importation as the Secretary of the Treasury may require for the purpose of assessing duties and to secure a proper examination, inspection, and appraisement, and liquidation, * * *.

Sec. 500—It shall be the duty of the appraiser under such rules and regulations as the Secretary of the Treasury may prescribe—

(1) To appraise the merchandise * * * by ascertaining or estimating the value thereof * * *, any statement of cost * * * in any invoice, affidavit, declaration * * * to the contrary notwithstanding;

(2) To ascertain * * * the quantities of the merchandise ordered or designated for examination;

(3) To ascertain whether the merchandise has been truly and correctly invoiced;

(4) *To describe the merchandise in order that the collector may determine the dutiable classification thereof; and* [Italics added]

(5) To report his decisions to the collector.

Sec. 505—* * * Upon receipt of the appraiser's report and of the various reports of landing, weight, gauge, or measurement the collector shall ascertain, fix, and liquidate the rate and amount of duties to be paid on such merchandise as provided by law and shall give notice of such liquidation in the form and manner prescribed by the Sec-

retary of the Treasury, and collect any increased or additional duties due or refund any excess of duties deposited as determined on such liquidation.

Sec. 514—* * * all decisions of the collector, including the legality of all orders and findings entering into the same, as to the rate and amount of duties chargeable, and as to all exactions of whatever character (within the jurisdiction of the Secretary of the Treasury), and his decisions excluding any merchandise from entry or delivery, under any provision of the customs laws, and his liquidation or reliquidation of any entry, or refusal to pay any claim for drawback, or his refusal to reliquidate any entry for a clerical error * * * shall, upon the expiration of sixty days after the date of such liquidation, reliquidation, decision, or refusal, be final and conclusive upon all persons (including the United States and any officer thereof), unless the importer, consignee, or agent of the person paying such charge or exaction, or filing such claim for drawback, or seeking such entry or delivery, shall, within sixty days after, but not before such liquidation, reliquidation, decision, or refusal, as the case may be, * * * file a protest in writing * * *.

The importer contends that "The Tariff Act of 1930, Section 514, fixes a 60 day period of limitation on 'all decisions' of the collector, and the original assessment of duty at the rate of 20% ad valorem was a 'decision' of the collector." The importer then concludes (after citing Customs Regulation 8.21 which was in effect at the time of entry, and which is based on section 484, *supra*), that

"it should be perfectly clear to anyone reading these provisions together that the duty assessed at the time of entry is a 'decision' of the Collector, or his agent, and therefore becomes final and conclusive after the lapse of 60 days under the provisions of Section 514 of the Tariff Act, in the absence of further action by the importer or the Government."

We are of the opinion that the importer's position in the foregoing respect is untenable. It can be readily seen from a combined reading of sections 484(a) and (d), *supra*, that it is the importer who makes the entry and sets forth the facts which are required for the purpose of assessing the duties at the time of entry. However, Section 500, *supra*, provides that the appraiser shall have the duty of: appraising the merchandise and estimating the value thereof, any statement of cost in any invoice to the contrary notwithstanding; of describing the merchandise in order that the collector may determine the dutiable classification thereof; and of reporting his decisions to the collector. In view of these provisions in the statute, we can hardly visualize that the assessment of duties at entry based on information provided by the importer is final and conclusive on the Government if the Government takes no action within 60 days of the date of entry. The foregoing sections of the Tariff Act, when taken together, clearly indicate that the classification made on entry, which is based on the importer's information, is not final, and that there can be no final classification until the appraiser's report is received by the collector. Thus these sections of the tariff act seem to refute appellant's contention that the assessing of duties at the time of entry is a "decision" of the collector, within the meaning of section 514, *supra*, which is final if no action is taken within 60 days.

In view of the special circumstances in this case, can the action of the collector in accepting the payment of duties at the rate of 20 per centum ad valorem be considered a decision of his which is final within 60 days when the classification of the merchandise as set forth on the entry papers by the importer was predicated on the above-cited letter of the Bureau of Customs? The opinion relative to classification, as set forth in said letter, was based, according to the record, on a sample of merchandise which was obtained from the German exporter. However, section 500, *supra*, provides that the appraiser must describe the imported merchandise in order that the collector may determine the dutiable classification thereof. Thus, had the collector accepted the classification of the merchandise at the time of entry without going through the step of appraisement, he would have been acting contrary to section 500, *supra*, since he would have been in effect relying on this information for clasisfication purposes without ever having considered the description furnished by the appraiser.

In view of the foregoing provisions of the statute, we cannot see how a final classification of merchandise can be made prior to the receipt of the appraiser's report, this, in essence, being what the importer contends should be done in the present case.

At this point, we must also consider section 505, *supra*, as it ties in with both section 514, *supra*, and the facts of the present case. This section provides for liquidation of an entry on receipt of the appraiser's report, and for the collection of increased duties or refund of any excess duties deposited as determined on such liquidation.

This portion of the statute is applicable to the present situation. It is to be noted that the official papers in this case not only showed that the original classification of the merchandise was in error, as determined after appraisement, but also that there was an excess quantity of merchandise not reported by the importer. In the latter respect, the following notation appears on the invoice, apparently made by the appraiser.

> "Excess: 7 spools. .25 mm dia. Mist Green @ .21 per spool. Apparently no intent to defraud. (Signature illegible)."

Thus since section 505, *supra*, clearly provides for the collection of additional duties or refund of excess duties deposited, the importer cannot argue that duties should not be paid for merchandise which was not declared on the entry. Obviously there is no such argument in the present case. However, the argument is of a similar tenor inasmuch as it is contended that the classification of merchandise which was made on entry is a "decision" of the collector which cannot be changed after 60 days, even though the appraiser under normal circumstances may not yet have had an opportunity to inspect the merchandise and forward his report to the collector within this time period. It is quite certain that the importer would not refuse to take money back which he paid as excess duties through error or mistake on the ground that all of these transactions became final 60 days after entry in the absence of a protest or of action by the collector. By the same reasoning, we cannot see why the Government should be precluded from determining the proper classification, amount, and value in the due course of events after entry in order to obtain the proper amount of duty, this being

provided for by section 505, *supra*. To give section 514, *supra*, the meaning urged by the importer would render section 505, *supra*, meaningless. This obviously is not in accordance with the rule of statutory construction that the entire context of a statute must be considered and every effort be made to give full force and effect to all language contained therein.

Section 505, *supra*, further provides that after receipt of the appraiser's report the collector shall liquidate the "rate and amount" of duties to be paid. In view of this, it can hardly be visualized that the assessment of estimated duties at the time of entry, that is, prior to the time of appraisement, is a final liquidation of the entry.

The counsel for appellant cites many cases in support of his argument. In *Davies* v. *Miller*, 130 U. S. 284 (1888), which we consider inapposite, a question arose under Rev. Stat. § 2931 as to whether the period allowed for filing a protest against the decision made by the collector at the time of entry upon the rate and amount of duties extends from the time of that decision, or only for the period of ten days from the date of the final ascertainment and liquidation of the duties as stamped on the entry. The court held that a protest could be made prior to final liquidation. See *Merritt* v. *Cameron*, 137 U. S. 542, 549 (1890). Appellant summarizes the holding of this case as follows: "The case is noteworthy **as it found the fixing of estimated duties to be a protestable 'liquidation' of the Collector.**" However, that case does not state that the collector cannot liquidate the entry subsequent to the pay-

ment of estimated duties. In fact, the contrary is brought out by the following portion of that case at page 288:

* * * *

> But the matter to which the notice of dissatisfaction applies is the decision of the collector on the rate and amount of the duties; the whole purpose of the notice is to give the collector opportunity to revise that decision; and that purpose is as well accomplished by giving the notice as soon as the goods have been entered and the duties estimated by the collector, as by *postponing the giving of the notice until after the final ascertainment and liquidation of the duties has been made and stamped upon the entry.* [Italics added].

* * * *

It is to be noted that this paragraph clearly recognizes that the Government, according to the practice followed at that time, and which is still the practice at the present time, can make a "final ascertainment and liquidation" of an entry. In short, all that *Davies* v. *Miller*, *supra*, held was that the importer could file a protest prior to final liquidation. This is no longer the law. Section 514, *supra*. Nowhere in that decision does it state that the Government is bound by the assessment of duties made at the time of entry; in fact, it completely refutes this idea.

Appellant also relies on *Merritt v. Cameron*, *supra*. We think that this case refutes rather than supports appellant's basic contention. We believe that the following portion of that case which appears at page 551, fairly summarizes the holding of the case:

* * * *

> Upon a careful examination of the question at issue, we are of opinion that the ascertainment and liquidation of the duties upon merchandise entered in bond for warehouse may take place at any time after the original entry of the merchandise, and that it is not required to be delayed until the importer chooses to withdraw his goods for consumption. The ten days referred to in section 2931, [Revised Statutes] within which the importer is allowed to protest, begin to run upon such ascertainment and liquidation of the duties; and, therefore, the protest in the case at bar was too late.
>
> * * * *

The Court also stated at page 550:

> * * *, we think the ascertainment and liquidation of the duties on merchandise entered in bond for warehouse should follow, in the regular course of business, as soon after the entry as is convenient, just as in the case of merchandise entered for immediate consumption. * * *

That case related to the question of whether goods entered for warehousing should be liquidated on their withdrawal from the warehouse, this being answered in the negative. In this respect that case is not analogous to the present case. However, that case is valuable in the respect that it does show, as does *Davies v. Miller, supra*, that the administrative practice at that time was to allow the collector to make a liquidation at any time after entry that was convenient. This, as we have discussed above, is the practice under the present sections of the statute, and refutes appellant's argument that the assessing of estimated

duties at entry is a decision of the collector which is final after 60 days.

Belford v. *Scribner*, 144 U. S. 488 (1891), cited by appellant, is completely inapposite since it relates to a copyright matter. That case cited *Davies* v. *Miller*, *supra*, at page 505 for the purpose of adopting the Court's reasoning with respect to the interpretation of a copyright statute, and nothing more.

Saltonstall v. *Birtwell*, 164 U. S. 54 (1896), cited by appellant's counsel, appears to be detrimental to his contention. In that case, an importer sued the Collector of Customs to recover certain duties alleged to have been overcharged on imported goods. The question in that case was whether the importer gave timely notice of protest and dissatisfaction with the decision of the collector. It is stated in that case at page 66, "The record discloses that when the gross estimates were made, as provided in section 2869 of the Revised Statutes, the importer paid the amounts thereof, and that subsequently, when the duties on the respective invoices were liquidated, protests in writing in the form required were filed." The Government's contention, that the protests, to be efficacious, should have been made at or before the time the payments were made according to gross estimates, was rejected. At page 70, the court stated, " 'Payment under protest' means a transaction where protest has been made in accordance with the requirement of section 2931, [within 10 days after liquidation] and, not 'at or before payment' of the estimated duties." Again, we might add, this clearly refutes appellant's contention that the assessing of estimated duties, even at that time, was a decision of the collector which

was final after the passage of a certain time period but before the liquidation of the merchandise.

The importer has cited other cases in his brief. We have analyzed all of them, and are of the opinion that they are so remote from the basic question in this case that it is inadvisable to attempt to distinguish them in this opinion.

There are other cases which support our conclusion. The case of *United States* v. *B. Holman, Inc.*, 29 C.C.P.A. (Customs) 3, C. A. D. 164, possesses facts which are different from those of the case at bar. Yet there is certain language in that case which we deem quite pertinent. It is stated at page 14:

> * * * all decisions of the collector involved in the ascertaining and fixing the rate and amount of duties chargeable against imported merchandise entered for consumption are merged in and become a part of a legal liquidation, and it is a legal liquidation only * * * against which a protest will lie. * * *

This language appears to crystallize the intent of the above-discussed sections of the statute, and we believe that it is quite applicable to the present case in that it refutes appellant's contention that the assessment of duties at entry is final if no action is taken relative thereto within 60 days.

The case of *United States* v. *DeRivera*, 73 Fed. 679 (C.C.S.D.N.Y. 1896), possesses a factual situation which is very similar to the present case. In that case iron ore was imported in 1881, and a duty was paid at entry. In

1890, the collector increased the duty. The importer claimed that the payment made at the time of entry was a liquidation, and since more than a year elapsed from the time of original payment of duties, the original payment was final and conclusive. The court held since liquidation was not complete until the collector had acted eight years later, and since there was no provision of law requiring the collector to liquidate within any particular time period, the importer was liable for the additional duties assessed at liquidation. We know of no case in which that case has been overruled, nor are we aware of any subsequent statutory enactment which renders the law of that case obsolete. In fact, the *DeRivera* case has been followed in the following cases. *Abner Doble Co.* v. *United States*, 119 Fed. 152 (9th Cir. 1902); *Franklin Sugar Refining Co.* v. *United States*, 144 Fed. 563 (C.C.D.Pa. 1906); and *Pacific Creosoting Co.* v. *United States*, 196 Fed. 35 (9th Cir. 1912).

In summary, we believe that all of the above-cited portions of the statute set forth a rather clear picture of procedure which is to be followed in the importation of merchandise. It is in the light of all of the portions of the statute, that Section 514, *supra*, should be interpreted. This brings us back to the interpretation of Section 514 contended for by appellant, namely, that the original assessment of duty at entry at the rate of 20% ad valorem is a "decision" of the collector which is final after 60 days. To place such an interpretation on section 514, *supra*, would in effect render the other above-cited portions of the statute meaningless. This is contrary to the well-settled rule of statutory construction that for the purpose of ascertaining the intention of Congress, the entire context

of the statute must be considered and every effort made to give full force and effect to all language contained therein. *Nestles Food Co. (Inc.)* v. *United States*, 16 Ct. Cust. Appls. 451, 455; *S. H. Kress & Co.* v. *United States*, 22 C.C.P.A. (Customs) 421, 424. Furthermore, appellant's contention is contrary to applicable case law. In view of the foregoing, we therefore hold that the assessing of duties at the time of entry was not a "decision" within section 514, supra, which was final and conclusive after 60 days had elapsed which would deprive the Government of the right to liquidate the entry at a subsequent date.

In addition, counsel for the importer contends that "If the collector may liquidate and assess duties 'at any time,' the Tariff Act of 1930 is unconstitutional insofar as it purports to authorize such procedure." Before analyzing the reasons which have been presented in support of the foregoing contention, it must be stated that under the Tariff Act of 1874, it was held that the law prescribes no time limit within which the collector shall make his original liquidation. *Vitelli & Son* v. *United States*, 7 Ct. Cust. Appls. 243, 256, T. D. 36544, **reversed on other grounds**, 250 U. S. 355 (1918). Also see *United States* v. *DeRivera*, *supra*, at page 680, wherein it is stated, "Under the statute, moreover, the collector may 'liquidate' whenever he pleases. It may be a week after the goods arrive, or it may be eight years, as it was in this case; * * *." At the present time, under the Tariff Act of 1930, there is still no provision in the statute setting forth a time limit for the collector to make his liquidation.

The reasons presented by the importer in support of the foregoing contention of unconstitutionality, do not,

in our opinion, support it. The importer claims there has been a deprivation of a right to a hearing, and that it is fundamental that there can be no deprivation of property without the right to a hearing. The facts of this case show that there has been no denial of a hearing. The importer had his day in court below, Abstract 58434, and we are reviewing that decision at the present time. It has been held that at times a preliminary decision by an agency is a step in an administrative proceeding, and no hearing at the preliminary stage is required by due process so long as the requisite hearing is held before the final administrative order becomes effective. *Ewing* v. *Mytinger & Casselberry*, 339 U. S. 594, 598 (1949). Where only property rights are involved, the mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of liability is adequate. *Phillips* v. *Commissioner*, 283 U. S. 589, 596-597 (1930). In the present case, property rights are involved, and there is no question that there has been an adequate opportunity given for the ultimate judicial determination of liability for import duties. Consequently, in our opinion, there has been no denial of due process.

Relative to the contention that the statute is unconstitutional, the importer further argues that the Government's "interpretation of the statute renders it invalid for the further reason that it imposes a burden on the importer that is unreasonable, arbitrary, and capricious, in that it makes the business of importing so hazardous and risky that many potential importers are prevented from engaging in foreign trade. Thus the importer or prospective importer is deprived of his right to engage in a business of his own choosing." Aside from the fact that

this argument is speculative, we have serious doubt as to whether appellant is in a proper position to question the constitutionality of the statute. To raise the constitutional question, the allegedly injured party must show that the statute operates to deprive him of a constitutional right. *Aikins* v. *Kingsbury*, 247 U. S. 484, 489 (1917). The "right" relied on by appellant is the alleged **right to engage in foreign trade.** In *United States v. DeRivera*, *supra*, it was stated, "The laws of the United States in regard to the liquidation and collection of duties upon imports are evidently constructed upon the theory that the citizen who imports goods has no rights at all, * * *." Furthermore, in *Buttfield* v. *Stranahan*, 192 U. S. 470 (1903), it was stated at page 493, "* * * it is not to be doubted that from the beginning Congress exercised a plenary power in respect to the exclusion of merchandise brought from foreign countries; * * *." It is further stated at page 494:

* * * *

> As a result of the complete power of Congress over foreign commerce, it necessarily follows that no individual has a vested right to trade with foreign nations, which is so broad in character as to limit and restrict the power of Congress to determine what articles of merchandise may be imported into this country *and the terms upon which a right to import may be exercised.* * * *" [Italics added]

Therefore, since Congress does have the plenary power to determine the terms on which the right to import may be exercised, and since the terms set forth in the statute have, in our opinion, been properly interpreted, we cannot

see where appellant has been deprived of any right, and we are of the opinion that appellant cannot therefore question the constitutionality of the statute on this ground.

The importer also argues that the imposition of additional duties under the statute at the time of liquidation is a "case of retroactivity so arbitrary, capricious, and unreasonable as to violate the requirement of due process." It is our view that this argument is not well founded. We cannot see where the imposition of additional duties at the time of liquidation is retroactive in an arbitrary manner, as urged by appellant, because the statute itself gives ample notice that there may be a change from the duties assessed at entry at the time of liquidation.

The importer has presented still another argument as follows: "If the collector may liquidate more than 60 days from the date of entry, he may not delay indefinitely but must liquidate within a 'reasonable time.' Two years was not a reasonable time in the present case." Appellant argues that the reason two years between the time of entry and the date of liquidation was unreasonable in this case was because there was very little investigative work done by the collector during this period, and that the intervening delays were entirely unexplained. However, appellant has not shown that there was any departure from the usual administrative practice as defined by the applicable statutes. While the testimony in the record shows that any delays which occurred prior to liquidation were not a result of the importer's action, this is far from a showing that there were unreasonable delays on the part of the collector, as appellant would have us believe. It is our opinion that the facts of the present case show that

liquidation occurred in the due course of events after entry, and therefore not at an unreasonable time after entry. Furthermore, the reasonableness of the time of liquidation is not a factor to be considered in this class of cases since, according to the interpretation given previous tariff statutes, there is no time limit within which the collector shall make his original liquidation, *Vitelli & Son v. United States, supra; United States v. DeRivera, supra.* This, as far as we know, is still the law under the Tariff Act of 1930.

For the foregoing reasons, the judgment of the Customs Court is **affirmed.**

Worley, J., concurs in the conclusion.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The *Constitution of the United States, Article I, Section 1:*

> "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

The *Constitution of the United States, Article I, Section 8:*

> "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States; . . .".

The *Constitution of the United States, Amendment V:*

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation".

The Tariff Act of 1930, Section 505, 19 U.S.C. 1505, 46 Stat. 732:

"**Payment of duties.** The consignee shall deposit with the collector, at the time of making entry, unless the merchandise is entered for warehouse or transportation, or under bond, the amount of duty estimated to be payable thereon. Upon receipt of the appraiser's report and of the various reports of landing, weight, gauge, or measurement the collector shall ascertain, fix, and liquidate the rate and amount of duties to be paid on such merchandise as provided by law and shall give notice of such liquidation in the form and manner prescribed by the Secretary of the Treasury, and collect any increased or additional duties due or refund any excess of duties deposited as determined on such liquidation."

The Tariff Act of 1930, Section 514, 19 U.S.C 1514, 46 Stat. 734:

> **"Protest against collector's decisions.** Except as provided in subdivision (b) of section 516 of this Act (relating to protests by American manufacturers, producers, and wholesalers), all decisions of the collector, including the legality of all orders and findings entering into the same, as to the rate and amount of duties chargeable, and as to all exactions of whatever character (within the jurisdiction of the Secretary of the Treasury), and his decisions excluding any merchandise from entry or delivery, under any provision of the customs laws, and his liquidation or reliquidation of any entry, or refusal to pay any claim for drawback, or his refusal to reliquidate any entry for a clerical error discovered within one year after the date of entry, or within sixty days after liquidation or reliquidation when such liquidation or reliquidation is made more than ten months after the date of entry, shall, upon the expiration of sixty days after the date of such liquidation, reliquidation, decision, or refusal, be final and conclusive upon all persons (including the United States and any officer thereof), unless the importer, consignee, or agent of the person paying such charge or exaction, or filing such claim for drawback, or seeking such entry or delivery, shall, within sixty days after, but not before such liquidation, reliquidation, decision, or refusal, as the case may be, as well in cases of merchandise entered in bond as for consumption, file a protest in writing with the collector setting forth distinctly

and specifically, and in respect to each entry, payment, claim, decision, or refusal, the reasons for the objection thereto. The reliquidation of an entry shall not open such entry so that a protest may be filed against the decision of the collector upon any question not involved in such reliquidation".

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. —

DART EXPORT CORP., ET AL., PETITIONERS

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Customs and Patent Appeals (Pet. App. 17-40) has not as yet been officially reported. The opinion of the Customs Court (R. 30-46) is reported at 33 Cust. Ct. 386.

JURISDICTION

The judgment of the Court of Customs and Patent Appeals was entered on February 21, 1956 (Pet. App. 17). The petition for a writ of certiorari was filed on May 18, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1256.

QUESTIONS PRESENTED

1. Whether the acceptance by the Collector of Customs of the amount of estimated duties upon the filing of a consumption entry, and the release of the imported merchandise to the importer, is a "decision" of the Collector within the meaning of Section 514 of the Tariff Act of 1930, so that the rate and amount of duty used in the estimate become final and conclusive at the expiration of 60 days thereafter unless a protest is filed by the importer.

2. Whether, if the acceptance of the estimated duties does not constitute a decision of the Collector, the Tariff Act of 1930 is unconstitutional in that it exacts monies from importers without due process of law.

STATUTE INVOLVED

The pertinent provisions of the Tariff Act of 1930, as amended (46 Stat. 590, 52 Stat. 1077, 19 U.S.C. 1001, *et seq.*) are set forth in the Appendix, *infra*, pp. 11-14.

STATEMENT

This case concerns an increase of $98.95 in customs duties which the Collector of Customs at New Orleans, Louisiana, upon final liquidation, assessed on two cases of "Perlon Artificial Gut" (also known as "nylon monofilament") imported into the United States from Germany (R. 30, Pet. App. 18).

The merchandise involved was imported by Dart Export Corporation, one of the petitioners herein, and was entered for consumption at the Port of New Orleans, Louisiana, on July 27, 1951 (Pet. App. 18). At the time of entry, the importer, relying on a letter from the Bureau of Customs (Exhibit #1, R. 29), written on February 8, 1951, which stated that in the opinion of that Bureau articles known as "perlon monofila-

ment" and "nylon monofilament" were classifiable for customs duty purposes as nonenumerated manufactured articles under Paragraph 1558 of Section 1 of the Tariff Act of 1930, *infra*, p. 11, deposited with the Collector of Customs estimated duties on the merchandise here involved at the rate of 20 per centum ad valorem under that Paragraph (Pet. App. 18-19). After the merchandise had been examined by the Appraiser, and upon receipt of the estimated duties, amounting to $78.80 (R. 30-31), the Collector of Customs on August 2, 1951, released the merchandise to the importer under bond (Pet. App. 19, R. 30) pursuant to Section 499 of the Tariff Act of 1930, as amended (46 Stat. 590, 728, 52 Stat. 1077, 1084, 19 U.S.C. 1499) and Sections 8.28 and 25.4 of the Customs Regulations. On the day that the merchandise was released to the importer, the Appraiser's office wrote to the Customs Information Exchange in New York asking whether the merchandise had been correctly invoiced as to value and whether similar merchandise had been received at any other port of entry (Pet. App. 19). The Customs Information Exchange then inquired of the New Orleans office whether the name of the manufacturer of the merchandise was known, and the New Orleans Appraiser, after discussing the matter with the importers' counsel, replied that the name of the manufacturer was not known. (Pet. App. 19-20.) Not having received a reply to its August 2, 1951, request, the New Orleans office on February 18, 1952, sent a follow-up letter to New York. The Customs Information Exchange replied on April 29, 1952 that no shipment of such merchandise had been received in New York, but that a quantity of it had been imported through San Francisco. The reply also advised that in view of a certain decision of the Customs

Court (referred to as C.D. 1366)[1] the question of classification had been submitted to the Customs Bureau on January 17, 1952, and that classification was suspended pending a ruling by the Bureau. (Pet. App. 20.)

The ruling of the Customs Bureau, following the Customs Court decision in the *Holeproof Hosiery* case, was to the effect that nylon filaments should be classified directly under the respective synthetic textile paragraphs of the Tariff Act rather than under Paragraph 1558 as unenumerated manufactured articles. This ruling was received by the New Orleans office on May 19, 1952. (Pet. App. 20.) Because samples of all of the merchandise had not been taken, the New Orleans office then obtained additional samples from the importer's counsel (Pet. App. 21). The samples were then submitted to the Customs Laboratory, which made its report on November 26, 1952 (Pet. App. 21). On the basis of that report, the Appraiser's office forwarded its decision as to value and its recommendation as to classi-

[1] The Customs Court decision referred to as C.D. 1366 was rendered in the case of *Holeproof Hosiery Co. v. United States*, 27 Cust. Ct. 176, wherein the Customs Court held for the first time that the definition of the term "synthetic textile" appearing in Paragraph 1313 of Section 1 of the Tariff Act of 1930 (46 Stat. 590, 652, 19 U.S.C. 1001, Paragraph 1313), which limits that term to cellulose products, does not prohibit the classification of nylon products as synthetic textiles under the synthetic textile paragraphs of the Tariff Act of 1930. This decision, rendered on October 23, 1951, had the effect of changing the previous classification of filaments of nylon textiles which had theretofore been considered, by reason of the statutory definition of the term "synthetic textile", not to fall within the paragraphs of the Tariff Act expressly covering filaments of synthetic textile, and therefore had to be relegated to the more general provision in Paragraph 1558 for unenumerated manufactured articles, as indicated by the letter written to the importer by the Bureau of Customs on February 8, 1951.

fication to the Collector on December 2, 1952 (Pet. App. 21-22).[2] The Appraiser agreed with the valuation declared by the importer at the time of entry, but recommended that the merchandise be given a different classification for duty purposes than that which had been used by the importer at the time of entry in estimating the amount of duties that were payable.

After waiting until the expiration of the 60-day period when the appraisal would become final, the Collector of Customs tentatively liquidated the entry, classifying the merchandise as filaments of synthetic textile with duty at 45 per centum *ad valorem* under Paragraph 1301 of Section 1 of the Tariff Act of 1930, *infra*, p. 11 (Pet. App. 23-24; R. 10). When the tentative liquidation had been verified by the Comptroller of Customs as required by law, the entry was finally liquidated by the Collector of Customs and notice thereof was given on June 23, 1953 (Pet. App. 23). On July 25, 1953, petitioners filed a timely protest to the final liquidation of the entry in which they disavowed any attack on the correctness of the classification adopted by the Collector, and expressly limited their protest to the contention that the action of the Collector on July 27, 1951, in accepting payment of the estimated duties and in releasing the merchandise to the importer was a final liquidation of the entry and was a decision of the Collector which, in the absence of a protest by the importer, became final and conclusive on all

[2] The Appraiser's decision as to value becomes final at the end of 60 days unless the Collector of Customs files an appeal to reappraisement within that time or the importer files an appeal within 30 days. See Section 501 of the Tariff Act of 1930, *infra*, pp. 12-13. His suggestions as to the classification and the rate of duty applicable are merely advisory, the Collector being the final classification officer (Pet. App. 23).

parties at the end of 60 days under Section 514 of the Tariff Act of 1930, *infra*, pp. 13-14. Hence, the ultimate contention of the protest was that the Collector of Customs had no power, after the expiration of 60 days from July 27, 1951, to assess duties on the imported merchandise at a rate different from that used by the importer in making its estimate. The Customs Court overruled the protest and the Court of Customs and Patent Appeals affirmed.

ARGUMENT

1. Petitioners, without questioning the correctness of the tariff classification adopted by the Collector of Customs in liquidating the entry of the imported merchandise, seek to upset the final assessment of duties solely on the ground that the Collector's acceptance of the importer's deposit of estimated duties and his release of the merchandise on July 27, 1951, was a liquidation of the entry by the Collector, and that it was, therefore, a decision by the Collector as to the rate and amount of duties within the meaning of Section 514 of the Tariff Act of 1930, *infra*, pp. 13-14, which, in the absence of a protest by the importer, became final at the end of 60 days (R. 9, Pet. 2-3). On this premise, they argue that the Collector's liquidation of June 23, 1953, was without force and effect.

Petitioners' argument ignores the fact that Section 505 of the Tariff Act of 1930, *infra*, p. 13, which provides expressly for the deposit of estimated duties, imposes no limit of time within which an entry must be liquidated. Furthermore, that Section contains internal affirmative evidence that the acceptance by a Collector of customs of a deposit of estimated duties, accompanied by the release of the merchandise involved,

is not a liquidation. The Section provides that the Collector shall liquidate only when he has received the Appraiser's report and the various reports of landing, weight, gauge, or measurement. Moreover, Section 500 (a) of the Tariff Act, *infra*, p. 12, which covers appraisements, provides no time limit for appraising imported merchandise. There are numerous situations where the appraisement of imported merchandise is necessarily delayed for long periods of time because of the extended investigations at home and abroad that are sometimes necessary to enable the Appraiser to make the various determinations involved in ascertaining the value of the goods. And, even after the appraisement is made, the importer has 30 days and the Collector 60 days within which to appeal therefrom to the Customs Court where they are entitled to an appraisement *de novo* with a further right of appeal to the appellate division of the Customs Court (28 U.S.C. 2636) and then an appeal to the Court of Customs and Patent Appeals (28 U.S.C. 2637).[3] See Section 501, *infra*, pp. 12-13. Since no valid liquidation may be made until the appraisement has become final and the appeals available have been exhausted (see, *e.g.*, *United States* v. *Tampa Box Company*, 15 Ct. Cust. Appls. 360; *Stubbs* v. *United States*, 7 Ct. Cust. Appls. 399), liquidation is often necessarily delayed for long periods in many cases.

Petitioners' construction of Section 514, which is

[3] The effect of petitioners' position would be that an importer could, by filing an appeal to the Customs Court on the appraisement, defeat the Government's right to collect the proper amount of duty on imported merchandise. And it would also destroy the Collector's right of appeal from an appraisement as provided in Section 501, *infra*, pp. 12-13, for should he file one, he would, under petitioners' construction, bar himself from later liquidating the entry.

based on the premise that acceptance of estimated duties and release of the merchandise, without more, constitute a liquidation and a final decision by the Collector, would unduly handicap the Government in the collection of its revenue, since it would have the effect of placing a 60-day limitation on its right to make investigations at home and abroad concerning imported merchandise, which experience has shown often require several years. Moreover, petitioners' construction would destroy the force and effect of many of the provisions of Sections 500 and 505 of the Tariff Act.

The authorities relied upon by petitioners as conflicting with the decision in this case are wholly inapposite. They relate to the propriety under various tariff acts of reliquidations made after final liquidation has once been made; they do not suggest that the estimated duty collected with an entry has the final and conclusive status of an original liquidation or of a Collector's decision under Section 514. And a large number of decisions have established the contrary proposition that there is no time limit within which an original liquidation must be made. *Pacific Creosoting Company* v. *United States*, 196 Fed. 35 (C.A. 9), certiorari denied, 229 U. S. 619; *Abner Doble Company* v. *United States*, 119 Fed. 152 (C.A. 9); *Gandolfi* v. *United States*, 74 Fed. 549 (C.A. 2); *United States* v. *De Rivera*, 73 Fed. 679 (C.C. S.D. N.Y.); *Vitelli & Son* v. *United States*, 7 Ct. Cust. Appls. 243, 256, reversed on other grounds, 250 U. S. 355; cf. *Beard* v. *Porter*, 124 U. S. 437; *Merritt* v. *Cameron*, 137 U. S. 542.

Both the Customs Court and the Court of Customs and Patent Appeals, which have exclusive jurisdiction,

subject to review by this Court, in matters pertaining to the appraisement and classification of imported merchandise, rejected petitioners' contentions on the ground that the construction urged by petitioners would contravene the statute and disrupt long-established customs procedure. Those courts have a peculiar expertise in the construction of tariff laws relating to imported merchandise and a close familiarity with the customs procedures which have long been established under those laws. Their concurrent decisions on such matters are, therefore, entitled to great weight, and, when, as here, their conclusions are free of error, they should be considered as final in this Court.

2. The constitutionality of the customs procedure is challenged by petitioners as violative of the due process requirement of the Fifth Amendment. However, no claim is made that the trial or the review process was unfairly conducted. Petitioners' only objection relates to the length of time during which the amount of the duty due remained uncertain, in this case slightly less than two years. If this were a basis for a due process objection, the entire tax structure of the United States would be subject to the same infirmity, since returns are frequently challenged long after receipt of the taxpayer's tentative payment. And the same argument could be used to attack the validity of the many judicial proceedings which leave the final determination of right in doubt for extended periods. These are regrettable delays, but they do not constitute a denial of due process. Petitioners' contention is plainly without substance.

CONCLUSION

The decision of the court below is clearly correct, there are no conflicts of decision, and further review is not warranted. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE, 1956.

APPENDIX

Section 1, paragraphs 1301 (46 Stat. 651) and 1558 (46 Stat. 672); Section 500 (46 Stat. 729, 19 U.S.C. 1500); Section 501 (46 Stat. 730, 19 U.S.C. 1501); Section 505 (46 Stat. 732, 19 U.S.C. 1505); and Section 514 (46 Stat. 734, 19 U.S.C. 1514) of the Tariff Act of 1930 provide, in pertinent part, as follows:

Section 1:

Par. 1301. Filaments of rayon or other synthetic textile, single or grouped, and yarns of rayon or other synthetic textile, singles, all the foregoing not specially provided for, weighing one hundred and fifty deniers or more per length of four hundred and fifty meters, 45 per centum ad valorem; weighing less than one hundred and fifty deniers per length of four hundred and fifty meters, 50 per centum ad valorem; and, in addition, yarns or rayon or other synthetic textile, plied, shall be subject to an additional duty of 5 per centum ad valorem: *Provided*, That none of the foregoing filaments shall be subject to a less duty than 40 cents per pound, and none of the foregoing yarns shall be subject to a less duty than 45 cents per pound. Any of the foregoing yarns if having more than twenty turns twist per inch shall be subject to an additional cumulative duty of 45 cents per pound.

* * * * *

Par. 1558. That there shall be levied, collected, and paid on the importation of all raw or unmanufactured articles not enumerated or provided for, a duty of 10 per centum ad valorem, and on all articles manufactured, in whole or in part, not specially provided for, a duty of 20 per centum ad valorem.

* * * * *

Section 500(a) Appraiser.

It shall be the duty of the appraiser under such rules and regulations as the Secretary of the Treasury may prescribe—

(1) To appraise the merchandise in the unit of quantity in which the merchandise is usually bought and sold by ascertaining or estimating the value thereof by all reasonable ways and means in his power, any statement of cost or cost of production in any invoice, affidavit, declaration, or other document to the contrary notwithstanding;

(2) To ascertain the number of yards, parcels, or quantities of the merchandise ordered or designated for examination.

(3) To ascertain whether the merchandise has been truly and correctly invoiced;

(4) To describe the merchandise in order that the collector may determine the dutiable classification thereof; and

(5) To report his decisions to the collector.

Section 501. Notice of appraisement; reappraisement.

The collector shall give written notice of appraisement to the consignee, his agent, or his attorney, if (1) the appraised value is higher than the entered value, or (2) a change in the classification of the merchandise results from the appraiser's determination of value. The decision of the appraiser shall be final and conclusive upon all parties unless a written appeal for a reappraisement is filed with or mailed to the United States Customs Court by the collector within sixty days after the date of the appraiser's report, or filed

by the consignee or his agent with the collector within thirty days after the date of personal delivery, or if mailed the date of mailing of written notice of appraisement to the consignee, his agent, or his attorney. No such appeal filed by the consignee or his agent shall be deemed valid, unless he has complied with all the provisions of this Act relating to the entry and appraisement of such merchandise. Every such appeal shall be transmitted with the entry and the accompanying papers by the collector to the United States Customs Court * * *.

Section 505. Payment of duties.

The consignee shall deposit with the collector, at the time of making entry, unless the merchandise is entered for warehouse or transportation or under bond, the amount of duty estimated to be payable thereon. Upon receipt of the appraiser's report and of the various reports of landing, weight, gauge or measurement, the collector shall ascertain, fix, and liquidate the rate and amount of duties to be paid on such merchandise as provided by law, and shall give notice of such liquidation in the form and manner prescribed by the Secretary of the Treasury, and collect any increased or additional duties due or refund any excess of duties deposited as determined on such liquidation.

Section 514. Protest against collector's decisions.

Except as provided in subdivision (b) of section 516 of this Act (relating to protests by American manufacturers, producers, and wholesalers), all decisions of the collector, including the legality of all orders and findings entering into the same, as to the rate and amount of duties chargeable, and

as to all exactions of whatever character (within the jurisdiction of the Secretary of the Treasury), and his decisions excluding any merchandise from entry or delivery, under any provision of the customs laws, and his liquidation or reliquidation of any entry, or refusal to pay any claim for drawback, or his refusal to reliquidate any entry for a clerical error discovered within one year after the date of entry, or within sixty days after liquidation or reliquidation when such liquidation or reliquidation is made more than ten months after the date of entry, shall, upon the expiration of sixty days after the date of such liquidation, reliquidation, decision, or refusal, be final and conclusive upon all persons (including the United States and any officer thereof), unless the importer, consignee, or agent of the person paying such charge or exaction, or filing such claim for drawback, or seeking such entry or delivery, shall, within sixty days after, but not before such liquidation, reliquidation, decision, or refusal, as the case may be, as well in cases of merchandise entered in bond as for consumption, file a protest in writing with the collector setting forth distinctly and specifically, and in respect to each entry, payment, claim, decision, or refusal, the reasons for the objection thereto. The reliquidation of an entry shall not open such entry so that a protest may be filed against the decision of the collector upon any question not involved in such reliquidation.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 96

DART EXPORT CORPORATION, ET AL.,
Petitioners,

versus

THE UNITED STATES,
Respondent.

REPLY BRIEF ON BEHALF OF PETITIONERS.

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August, 1956

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REPLY BRIEF ON BEHALF OF PETITIONERS.

Petitioners herein seek to prevent the Collector of Customs of The Port of New Orleans from assessing additional customs duties on imported merchandise approximately two years after the date of importation. The originally assessed rate was 20% ad valorem. The subsequently assessed rate was 45% ad valorem. The increase resulted from a "reclassification" of the merchandise by the collector. No fraud is involved. Petitioners attack the new assessment on the grounds that: (1) the importer relied on a letter from the Bureau of Customs prior to importation advising that the rate applicable was 20%; and (2) the Collector is barred from assessing a higher rate more than 60 days after date of the original assessment under the provisions of Section 514 of The Tariff Act.

The United States, in opposition, contends that the said limitation period does not commence to run until the Collector designates his decision as final, and since his investigations often require several years, he may assess a higher rate of duty at any time. The government further argues that rejection of petitioners' contentions by the courts below should not be reviewed by this court, on the theory that those courts have a "*peculiar expertise*" in the construction of tariff laws which entitles their decisions to great weight.

It cannot be too strongly emphasized that the question presented is not what rate of duty is applicable to the particular merchandise involved. If that were the issue the "peculiar expertise" of the courts below would indeed come into play, and their decisions would be entitled to great weight. But such is not the case. The question presented is whether the Bureau of Customs may induce the citizen to import merchandise by agreeing in writing in advance of importation as to the rate of duty applicable, assess and collect said agreed customs duty at the time the merchandise is brought in, and then, two years later, reassess and collect a higher rate of duty, notwithstanding the importer may have sold the goods at a price based upon the agreed rate of duty, and notwithstanding the 60-day limitation period on "all decisions" of the Collector provided by Section 514 of The Tariff Act.

Certainly it requires no "peculiar expertise" to see that the rule advocated by the government renders uncertain and speculative for an unlimited period of time a large portion of our international commercial transac-

tions covering all types of imported goods, wares, merchandise, and materials, including strategic materials and other items vital to the welfare of our country, and is not by any means confined to the particular merchandise or the particular facts here involved.

Nor does it require any particular training or ability to recognize the fact that the procedure in question is manifestly unfair to the individual importer who relies on the findings and agreements of those charged with the collection of customs duties prior to and at the time of importation, and that it amounts to a denial of due process by permitting the Collector of Customs to withhold final assessment of duties for an unlimited time, without any remedy whatsoever being available to the importer to compel final determination of the amount due.

Nevertheless, the government seeks to justify its position by asserting that the construction urged by petitioners would contravene the statute and disrupt long-established customs procedure. The argument is without merit. Petitioners rely on the statute which speaks for itself, and which on its face fixes a 60-day limitation period on "all decisions" of the collector. And there is not a shred of evidence in the record to support the conclusion that petitioners' construction would disrupt long-established customs procedure. On the contrary, as will be noted by reference to pages 27-28 of the record, petitioners at the time of trial attempted in vain to elicit

information from the government witness as to what is the usual and customary practice with regard to liquidation of customs entries. Although the witness was the deputy collector in charge of liquidations, he stated he was unable to say whether the procedure followed in the present case was customary or unusual, or even that the elapsed time in this case was not an unusually long time. Furthermore, the government trial attorney objected three times to questions seeking the required information, which objections were sustained, so that it became impossible to establish just what the usual procedure is with reference to time of liquidation. Accordingly, the government cannot now justify its position on the ground that "long-established customs procedure" would be violated if petitioners should prevail. The record, with respect to average time of liquidation, is completely barren, and customs procedure, long-established or otherwise, remains an unknown factor.

Thus there is no basis whatsoever for the decisions of the courts below. The result is patently unjust, illogical, contrary to the express terms of the statute, contrary to public policy, violative of constitutional rights, contrary to Congressional intent, and contrary to the decisions of this court. Moreover, the questions presented are important ones that affect a large segment of international trade.

While this court will not ordinarily review decisions of the Court of Customs and Patent Appeals that involve merely technical questions, certiorari will be granted to review a decision of that court where the case involves issues of constitutional or statutory importance.

Barr v. U. S., 324 U. S. 83. It is respectfully submitted that this case involves such issues, and that the writ prayed for should be granted.

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